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SUPREME COURT, U.S.

No. 81-5937

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

DEWEY EUGENE COLEMAN,

Petitioner,

-v-

STATE OF MONTANA,

Respondent.

On Writ of Certiorari to the
Supreme Court of Montana

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, State of Montana, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Montana Supreme Court's opinion in this case. The opinion is reported at 633 P.2d 624.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The questions presented are not addressed in the opinion below.

Following this Court's denial of certiorari to review petitioner's direct appeal in May 1980, petitioner filed a petition for postconviction relief in the original trial court. Most of the 52 claims presented in that petition had been previously considered by the Montana Supreme Court and were therefore rejected by the district court on the basis of res judicata. Each of the questions presented in the instant petition was rejected by the Montana Supreme Court on the procedural grounds of res judicata, a holding not challenged

in this Court. The merits of the questions presented were addressed in previous opinions, not in the opinion petitioner has asked this Court to review.

2. The questions presented contain assertions that are not supported by the record.

a. Under Montana's law respecting corroboration the testimony of petitioner's accomplice was sufficiently corroborated by other evidence.

Petitioner's first question suggests that the testimony of his accomplice, Robert Nank, was uncorroborated and, therefore, insufficient to support his capital conviction. However, the relevant issue argued and decided in the court below was not the substantive issue of whether Nank's testimony was sufficiently corroborated, but rather the procedural issue of whether petitioner could relitigate claims in a postconviction proceeding previously determined on direct appeal. Therefore, the dissent on which petitioner relies so heavily addresses an issue that was neither briefed nor argued in the postconviction phase of petitioner's case.

In petitioner's three trips to the Montana Supreme Court since his conviction in 1975, only one judge, the Honorable Frank B. Morrison, Jr., whose term commenced in January 1981, has found the record wanting with respect to the corroboration issue. Nine other judges, who have each considered petitioner's case at least once, disagree. Notably, the only other judge to dissent from the affirmance of petitioner's convictions and sentences, the Honorable Daniel J. Shea, specifically found in an earlier appeal:

> Nank's testimony, combined with the corroborating evidence implicating Coleman in the crimes involved, is sufficient beyond a reasonable doubt, to permit a jury conclusion that Coleman was guilty of the crimes for which he was convicted.

State v. Coleman, 36 St. Rptr. 2237, 2248, 605 P.2d 1000, 1059 (1979).

Finally, while petitioner may have related a different version of the events of July 4, 1974, than Robert Nank's, petitioner's story lacked credibility in the eyes of the jury because of the two entirely different stories he had related to authorities prior to trial. At trial, petitioner testified that he and Nank had separated. But prior to trial, he first asserted that he and Nank were both picked up while hitchhiking and nothing untoward had happened. In another statement, which had been recorded and was played for the jury, Coleman admitted seeing the victim's abandoned car and finding her purse.

b. The jury in petitioner's case specifically found beyond a reasonable doubt the aggravating circumstance justifying imposition of the death penalty.

Petitioner's second question implies that his jury had no input into the decision to impose the death penalty. While it is true that Montana's statutory scheme for capital punishment does not require jury participation, petitioner's jury did participate by answering a special interrogatory submitted to them during their deliberations. In this case the jury found beyond a reasonable doubt the aggravating circumstance justifying imposition of the death penalty.

c. Petitioner was given two opportunities to challenge the evidence of the prior commission of an aggravated burglary.

At trial, the State did not present evidence relative to petitioner's commission of an aggravated burglary because of the possibility that it might later be found to constitute reversible error. However, petitioner's attorney

cross-examined Nank concerning the burglary. Following this development Nank testified in detail about the burglary and petitioner denied that the crime was committed.

Coleman had a second opportunity to refute the aggravated burglary story at the penalty trial following the remand of his case. At that time he was given the chance to contest the pre-sentence report that contained information regarding the burglary but he refused to do so. In fact, petitioner refused to offer any evidence in mitigation at the penalty trial and refused to permit the State to call him as a witness.

3. The court below, in prior appeals, correctly determined the issues now presented to this Court.

a. Petitioner's conviction was supported by substantial evidence from which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Following a four week trial at which over seventy (70) witnesses testified, petitioner was convicted by a jury that had been properly instructed with respect to the State's burden of proof. The original decision of the Montana Supreme Court, written by the Honorable Frank I. Haswell, Chief Justice, detailed the evidence that corroborated the testimony of Coleman's accomplice, Robert Nank. State v. Coleman, 177 Mont. 1, 28, 579 P.2d 732, 749 (1978). Applying sound principles of Montana law to a complex factual record, the court found that Nank's testimony had been adequately corroborated.

b. Montana law, which makes no provision for jury sentencing, is constitutionally sound.

The Montana Supreme Court's conclusion reached in State v. Coleman, 36 St. Rptr. 1134, 1151, 605 P.2d 1000, 1017 (1979), that jury participation in sentencing is not constitutionally mandated is based on sound principles of law. Fitzpatrick v. State, 38 St. Rptr. 1448, 1458-59 (1981).*

c. Petitioner's prior offense was properly considered by the district court.

The Montana Supreme Court's decision relative to the mitigating effect of petitioner's prior record, found in State v. Coleman, 36 St. Rptr. 1134, 1154, 605 P.2d 1000, 1020 (1979), is based on sound principles of law.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

DATED this 27th day of January 1982.

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*See also Westbrook v. Balkcom, 449 U.S. 999, 1003 (1980) (White, J., dissenting from denial of cert.); Lockett v. Ohio, 438 U.S. 586, 633 (1978) (dissenting opinion of Rehnquist, J.); Richmond v. Arizona, 434 U.S. 1323, 1325 (1977) (opinion of Rehnquist, J., as Circuit Justice); Jacobs v. State, 361 So.2d 640, 646 (1978) cert. denied 439 U.S. 1122 (1979); Beck v. State, 365 S.2d 985, 1001 (Ala. Cr. App.), aff'd. 365 So.2d 1006 (Ala. 1978), rev'd on other grounds, 100 S.Ct. 2382 (1980); State v. Simants, 197 Neb. 549, 250 N.W.2d 881, 887 (1977), cert. denied 434 U.S. 878; State v. Anderson, 207 Neb. 51, 296 N.W.2d 440, 453 (1980); State v. Valencia, 121 Ariz. 191, 589 P.2d 434 (1979); State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied 440 U.S. 924 (1979); State v. Richmond 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied, 443 U.S. 915 (1977).